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Mike-Sell's Potato Chip Co. and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC. Case 09-CA-072637

March 19, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On July 3, 2012, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent and Acting General Counsel each filed exceptions, a supporting brief, and an answering brief. The Respondent also filed a reply to the Acting General Counsel's answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mike-Sell's Potato Chip Co., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the following action.

1. Cease and desist from

(a) Making midterm modifications to the health and welfare terms of the collective-bargaining agreement with the Bakery, Confectionary, Tobacco, Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC (the B&C Union) without following the contractual reopening procedures.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to include the appropriate remedial language for the violation found, including a remedial provision regarding the tax consequences of making bargaining unit employees whole, in accordance with our decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), and we shall substitute a new notice to conform to the Order as modified.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore to employees in the bargaining unit represented by the B&C Union the contractual health and welfare benefits they enjoyed before the Respondent unlawfully modified the benefits on January 1, 2012.

(b) Make all employees in the bargaining unit represented by the B&C Union whole for all expenses incurred and all losses suffered as a result of the Respondent's unlawful modifications of the collective-bargaining agreement, including depositing into the employees' health savings accounts the amounts it failed to contribute, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum award.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceed-

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 19, 2013

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
 APPENDIX
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
 Choose representatives to bargain with us on your behalf
 Act together with other employees for your benefit and protection
 Choose not to engage in any of these protected activities.

WE WILL NOT make midterm modifications to the health and welfare terms of our collective-bargaining agreement with the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC (the B&C Union) without following the contractual reopening procedures.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore to our employees in the bargaining unit represented by the B&C Union the contractual health and welfare benefits they enjoyed before we modified the benefits on January 1, 2012.

WE WILL make whole, with interest, all employees in the bargaining unit represented by the B&C Union for all expenses incurred and all losses suffered as a result of our unlawful modifications of the collective-bargaining agreement, including depositing into the employees' health savings accounts the amounts we failed to contribute.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum award.

MIKE-SELL'S POTATO CHIP CO.

Eric V. Oliver, Esq. and Zuzana Murarova, Esq., for the General Counsel.

Jennifer R. Asbrock, Esq. and Robert J. Brown (on brief) (Thompson Hine LLP), of Dayton, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on April 30, 2012. The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC (the Union or the B&C Union) filed the charge on January 17, 2012, and the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the complaint on March 20, 2012. The complaint alleges that Mike-Sell's Potato Chip Co. (the Respondent or the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by implementing changes to the health and welfare benefits of unit employees without following the mid-term reopening procedures set forth in the collective-bargaining agreement (the CBA) and without the Union's consent. The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures and distributes snack foods from its facility in Dayton, Ohio, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Ohio. I find that the employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The Respondent is a snack food company that employs approximately 183 individuals. The B&C Union represents a bargaining unit of 22 of the Respondent's maintenance and production department employees.¹ This bargaining unit has been represented by a union for approximately 50 years.

The most recent CBA between the Respondent and the B&C Union was executed on November 15, 2010, and is effective by its terms from August 5, 2010, until August 5, 2014. The CBA sets forth health care benefits that the Respondent is required to provide to unit employees, but also includes a clause that permits either party to reopen negotiations on those benefits during the life of the contract if more than 1 year has passed since the contract's execution. The clause creates a process by which the matter can be resolved through mediation and binding arbitration in the event that the parties are unable to reach agreement regarding the changes sought through the reopening. The reopening clause states:

Section 11.7 (Reopening Clause)—The company and union hereby agree that all health and welfare benefits defined in this agreement in article 11 shall remain in full force for one (1) year from the execution of this agreement. After one year, either the company or the union shall have the right to reopen this agreement and to redefine all health and welfare benefits by simply serving the other party with a written notice of its intention to reopen negotiations concerning all health and welfare benefits. Within ten (10) days after sending of said notice, the company and union shall begin negotiations for health and welfare benefits. If the company and union are unable to agree within ten (10) days after beginning negotiations for health and welfare benefits as to the health and welfare benefits, then, the matter shall be referred to Federal Mediation for resolution. If a resolution is not reached through Federal Mediation within ten (10) days after referral, then company and union agree the matter shall be submitted to binding arbitration. The binding arbitration shall be held and completed within thirty (30) days after the request of either party for binding arbitration.

The parties' prior contract also included a health care benefits reopening clause, and the Respondent invoked that clause in 2008. In that instance, the parties did not reach agreement on the changes and the process of reopening, negotiating, mediating, arbitrating, and implementing changes pursuant to the arbitrator's decision took approximately 1 year.

In addition to the bargaining unit represented by the B&C Union, there are three other bargaining units at the Respondent that are represented by locals of the International Brotherhood of Teamsters (the Teamsters). The Teamsters' labor contracts,

¹ The CBA defines the scope of the unit as: "[E]mployees of the Company in its Production Department and Maintenance Department, exclusive of all office and clerical employees, drivers, salesmen and helpers, warehousemen, and all guards, professional employees and supervisors, as defined in the National Labor Relations Act." GC Exh. 2, at Art. I, Sec. 1.1.

unlike the B&C Union's CBA, give the Respondent the right to unilaterally make changes to the employees' health care benefits as long as the benefits are the same as those provided to salaried and nonunion personnel.

B. Health and Welfare Benefits under the B&C Union Contract

The health care benefits set forth in the CBA for the B&C Unit consist of a high-deductible insurance plan and an employer subsidized health savings account. Under the terms described in the CBA, the annual health care deductible is \$2000 for an individual participant, and \$4000 for a family. After an employee reaches that deductible, the Respondent pays 100 percent of further medical expenses. The Respondent also maintains employee health savings accounts into which employees may make pretax contributions. The Respondent contributes \$500 to the health savings accounts of individual-plan participants, and \$1000 to the health savings accounts of family plan participants. These are the same benefits that all the other employees of the Respondent were receiving as of the end of 2011. The Respondent is self insured, but its plan is administered by a health insurance company.

C. Respondent Notifies Union that it is Reopening Negotiations on Health Care Benefits

In 2011, the Respondent decided to make reductions to employees' benefits. Sharon Wille, the Respondent's human resources director, testified that the Respondent was doing this because of a combination of increases in the costs of health care and other expenses, and decreases in sales. After considering a number of different plans, the Respondent settled on continuing its self-insured plan with reduced benefits. The Respondent would continue the \$2000 individual and \$4000 family deductibles, but after that threshold was reached the Company would pay 80 percent of additional medical expenses, rather than the 100 percent set forth in the CBA. Once the employee reached out-of-pocket expenses of \$4000 for an individual participant or \$8000 for a family participant, the Respondent would pay 100 percent of additional medical expenses. The Respondent also planned to cut the amounts it was contributing to employees' health savings accounts. Instead of \$500 per year for individual plan participants it would contribute \$250, and instead of \$1000 for family plan participants it would contribute \$500. The Respondent estimated that it could save \$220,000 annually through these reductions to health care benefits.

Wille sent a letter, dated November 8, 2011, to Vester Newsome, the treasurer/financial secretary of the B&C Union and its only full-time officer. The letter stated:

The Company intends to reopen negotiations concerning all health and welfare benefits. This notice is in accord with Article 11, Section 11.7 of the collective bargaining agreement.

We are available November 10th, 14th, 16th and 17th to begin the negotiations. Please let me know what dates you can be available.

Newsome discussed Wille's letter with Stephen Campbell, the facility's union steward and a member of the B&C Unit. Newsome and Campbell decided that they did not want any

change “unless it was going to be for the better.”²

In a November 10 letter, Newsome responded to Wille’s November 8 correspondence. Newsome stated that the Union was prepared to reopen negotiations regarding health care benefits once the Respondent gave it “a reason for reopening.” Newsome did not state whether or not the Union was accepting any of the bargaining dates proposed in Wille’s letter and did not propose alternative bargaining dates. There followed a flurry of correspondence between the Respondent and the Union during which the Respondent tried to move the reopening process forward quickly, and the Union challenged the adequacy of the Respondent’s answer to its request for “a reason for reopening” and declined to agree to bargaining dates and a mediation date proposed by the Respondent. In a November 29 email communication, Wille told Newsome that she planned to move the reopening process to the binding arbitration stage and expected arbitration to occur within the next 30 days.

In email correspondence on December 2, 2011, the Union’s attorney—Leonard Sigall—informed the Respondent’s attorney—Jennifer Fuller—that the Union viewed Wille’s November 8 reopening notice as premature and therefore “void.” Sigall stated that the CBA provided that the notice of reopening could not be served on the other party until 1 year from the execution of the CBA, but that Wille had served the Respondent’s notice of reopening on November 8, 2011—less than a year after the CBA was executed on November 15, 2010. Sigall also informed Fuller that “[t]he Union does not agree with the proposal” “to redefine health and welfare benefits.”

Attorney Fuller responded on December 6, conceding that the Union had “identified a technical flaw in the Company’s one-week premature notice to reopen.” She stated, “Because of the technical flaw, the Company is willing to once more invite the Union to negotiate over proposed changes to the insurance program during the next 10 days, in accordance with Section 11.7 of the Labor Agreement”—essentially agreeing that the reopening timelines would commence as of Fuller’s December 6 letter rather than Wille’s November 8 letter. Fuller offered four bargaining dates, and Sigall agreed to bargain on one of the dates offered—December 14, 2011.

D. Respondent’s December 12 Meeting with Unit Employees

On December 12, 2011—2 days prior to the Respondent’s first scheduled negotiating session with the Union—Wille and a representative from the Respondent’s health insurance broker held a 30-minute meeting with about 10 to 15 B&C Unit employees in order to discuss reductions to health care benefits. Campbell was among those in attendance. Wille told the employees that the Respondent could no longer afford the health

care plan and had to make some changes. She told the employees that everyone would have the same benefits, including the Respondent’s CEO and president. Wille and the health insurance broker’s representative explained various aspects of the anticipated reductions. During the meeting the insurance broker provided employees with informational packets that had not been shared with the Union and which described the new health care benefits. Wille told the employees that on December 14 she would be meeting with Newsome and Campbell regarding the changes.

Witnesses for the General Counsel and the Respondent gave conflicting testimony regarding whether, at the December 12 meeting, Wille stated that the Respondent had already decided that the reductions would take effect for the B&C Unit employees on January 1, 2012, or whether she stated that the Respondent had to first negotiate with the B&C Union.³ There is no complaint allegation that the Respondent violated the Act by its statements at the December 12 meeting, and I find it unnecessary to resolve this credibility question.

E. December 14 Meeting

The Respondent implemented the health care benefit reductions described above on January 1, 2012, for all employees, including those employees represented by the B&C Union. There is no dispute that it did this after initiating the contractual reopening process regarding health care benefits, but without obtaining a decision from an arbitrator. The factual issue in this case is whether the Union and the Respondent reached agreement regarding those reductions during the negotiating session on December 14, 2011.

The following facts relating to the December 14 negotiating session are uncontested. The December 14 meeting was the first and only negotiating session that the Respondent and the B&C Union had regarding the at issue reductions to unit members’ health care benefits. It was attended by just three individuals—Wille, Newsome, and Campbell—and lasted approximately 10 to 20 minutes. Prior to December 14, the Union informed the Respondent that it did not agree with the Respondent’s plan for reductions. Before entering the December 14 session, Campbell and Newsome decided that they were not going to agree to the reductions. Wille began the meeting by describing the reductions that the Respondent wanted to make. Newsome and Campbell discussed the negative impact that the reductions would have on unit employees. Newsome suggested

² On November 7 and 8, 2011, the Respondent issued letters directly to all employees, *except* those represented by the B&C Union, stating that the Company would be making the reductions outlined above as of January 1, 2012. The letters to the three Teamsters represented units noted that their labor contracts gave “The Company . . . the right to change insurance as long as the benefits are the same as the benefits provided for the salaried/non-union company personnel.” The Respondent explained the changes by stating that it had to “take immediate steps to mitigate . . . increased costs” and gave notice that the changes would “be effective company-wide on January 1, 2012.”

³ According to Wille’s testimony, she told the unit employees that the plan being described was “the plan we were proposing going to in January, but we had an obligation to negotiate with their Union.” Neither the insurance broker, nor any other potential witness, was called by the Respondent to corroborate Wille’s account of the December 12 meeting. Campbell, the union steward for the facility, contradicted Wille, testifying that Wille stated “We all need to be on [the new health care package] together so it was going on on January 1.” According to Campbell, Wille said “[n]othing really about bargaining.” Wille’s account was also contradicted by Christopher Clark—a unit employee who did not hold any position with the Union. According to Clark, Wille stated that the reductions were going to be implemented on January 1, 2012, and did not mention any obligation to negotiate with the Union over the reductions.

a number of alternatives to the reductions that Wille had outlined, but Wille rejected those alternatives during the meeting. The union representatives never stated that they agreed with the proposed changes.⁴ The meeting did not generate a written agreement, or any written confirmation of an agreement. Following the meeting, the Respondent did not seek further negotiating sessions, or attempt to move the reopening process forward to mediation and arbitration. On January 1, 2012, the Respondent implemented the health care benefit reductions for all employees, including those in the B&C Unit. On January 13, 2012—the day after the employees received their first paychecks showing that the Respondent had reduced their health care benefits—Newsome wrote to Wille asking the Respondent to reinstate the old benefits and stating that the Respondent had made the change without the Union's consent and without an arbitrator's ruling. In a letter dated January 19, Wille responded that the "Union agreed to the proposed changes at the table" on December 14, and that the Respondent would not reinstate the prior benefits.

There are significant disputes regarding other facts relating to the December 14 negotiating session. Wille offered this description of the meeting: "It was very congenial. Everyone agreed we had the right to do this and everyone was happy and smiling." Wille testified that Newsome asked if there were going to be any further reductions, and that she answered that there would not be "for another year," but that she did not know what would happen after that. According to Wille, Newsome stated that "the contract did give [the Respondent] the right to make the changes." Wille testified that she responded, "Well yeah it does and we're going to implement January 1." According to Wille, when she read Newsome's January 13 letter stating that no agreement had been reached she was "absolutely stunned."

Campbell's and Newsome's testimonies conflict with Wille's in several important respects. According to both Campbell and Newsome, they told Wille that the employees could not afford the additional reductions and Newsome testified that he said "we just can't give up any more." Newsome testified that he and Campbell reminded Wille of various financial sacrifices that the Union had made starting in 2006 to help the Respondent cut costs. Both Newsome and Campbell testified that they pointed out that the Respondent's contracts with the Teamsters gave management the power to make health care benefit changes for those bargaining units without negotiating, but that the CBA for the B&C Unit did not give the Respondent that power. According to Campbell, he told Wille that, for this reason, the B&C Union "had a choice" regarding the health care benefit reductions, unlike the Teamsters-represented employees or the salaried employees. Campbell testified that Wille responded that "[w]e all need to be on the same thing." Both Campbell and Newsome testified that they told Wille that

the B&C Union did not agree to the proposed reductions. According to Campbell and Newsome, Wille stated that the Respondent was going to implement the changes for other employees on January 1, but did not state that the Respondent was going to implement the changes for the B&C Unit. According to Newsome, as the meeting ended he told Wille that if she "wanted to continue, she could, we could go to the arbitrator, let an arbitrator decide."

Based on my consideration of the demeanor and testimony of the witnesses and the record as a whole, I credit the testimonies of Campbell and Newsome over the testimony of Wille regarding all disputed aspects of the December 14 meeting. I note at the outset that I find Wille's account implausible in the extreme. Why would Newsome and Campbell be, as Wille claims, "happy and smiling" during a meeting at which the Respondent was forcing substantial reductions on the Union without providing any counterbalancing concessions? Campbell, as a unit employee would see his own benefits sharply reduced. Moreover, Wille immediately rejected the alternatives that Newsome proposed even though Campbell and Newsome discussed how painful the proposed reductions would be for unit employees. And yet, Wille want us to believe that Campbell and Newsome were "happy and smiling." Really?

Moreover, it is not credible that the Union would surrender on this important issue only 10 to 20 minutes into the first negotiating session on the subject. All the evidence indicates that the Union had been gearing up for a battle regarding the reductions. In its December 2 email to the Respondent, the Union informed the Respondent that it did not agree with the reductions. Newsome and Campbell entered the December 14 meeting having resolved to resist the reductions. It is clear that since November 8, when the Respondent broached the subject of reopening negotiations on health care benefits, the Union had been in no hurry to see that process move forward and, indeed, the Respondent contends that the Union was engaging in delaying tactics. (R. Br. at p. 12.) Why then, would the union officials simply agree to the unwanted reductions within 20 minutes of the start of negotiations? By refusing to agree, the Union could potentially have either stopped the reductions from being implemented or extracted concessions from the Respondent. At a minimum, the Union could have required the Respondent to go through the reopening clause's full negotiation/mediation/arbitration process, thereby postponing the imposition of the reductions. Indeed, when the Respondent invoked the reopening process for health care benefits in 2008 the Union had done this and, while ultimately unsuccessful in preventing the unwanted changes, had nevertheless succeeded in postponing those changes by about a year. On this record, I believe that, as Newsome and Campbell indicated, they told Wille that the Respondent would have to take the matter to arbitration if it wished to pursue the reduction in unit member's benefits.

Wille's claim that she and Newsome agreed that the Respondent had "the right to make the changes" for the bargaining unit employees is also dubious because the Respondent did not, in fact, have that right. When asked to identify the right that she claims she and Newsome were talking about, Wille stated that the CBA "says that we have the right to change benefits as

⁴ See Tr. 41 (Newsome testified that at the end of the meeting he stated that the Union would not agree to any of the proposed changes); Tr. 100 (Campbell testified that "we said that we couldn't make any changes, couldn't agree to that and that, that was it."); and Tr. 177 (Wille testified that the Union representatives did not say "we agree with these changes.").

long as [the B&C Unit's] are equal to management's or better." However, when asked where that right exists in the CBA she was unable to do so and conceded she might have been thinking about one of the Respondent's other contracts. In fact, the CBA with the B&C Union does not give the Respondent the right to unilaterally change the health care benefits of unit employees unless it obtains a favorable decision from an arbitrator. It is implausible that Newsome and Campbell would agree to the existence of so significant a management right when that right did not exist. I believe, instead, that as Newsome and Campbell both testified, they correctly observed during the meeting that the Respondent had the right to unilaterally change the health care benefits under the Teamsters' contracts, but not under the B&C Union's contract.

Wille's claim that, on December 14, the parties reached agreement regarding the reductions is made even more implausible by the fact that the purported agreement was not reduced to writing or signed off on by the parties. In addition, although the record shows that the Respondent and the Union had previously engaged in extensive, rapid fire, correspondence regarding the Respondent's effort to renegotiate health care benefits, Wille did not even follow up the December 14 meeting with correspondence confirming the supposed agreement that she had so actively been seeking. Moreover, the Respondent did not show that, subsequent to the purported agreement, it notified the B&C union employees that it would be implementing reductions to their health care benefits effective January 1. The reductions at issue in this case would affect every bargaining unit employee and could cost an employee thousands of dollars annually. The Respondent hoped that by implementing the reductions it would save \$220,000 annually. Given the magnitude and importance of the reductions, it is simply not credible that Wille, having secured the Union's agreement, would neglect to confirm that agreement in writing.⁵

I also found that Wille was a less than fully credible witness

⁵ Newsome testified that when the Union and the Respondent agree to changes they generally "sign off" on them, Tr. 42-43, and Campbell stated that a "large change," such as health care benefit reductions, would be taken to the membership for a vote, but that there was no membership vote in this case. (Tr. 102-103). Wille, on the other hand, testified that when the parties reach mid-term agreements to alter the terms in the CBA they do not always reduce their agreements to writing or put them to a vote by the Union's membership. (Tr. 178, 182). The record does show that the parties had an agreement to increase the hourly wage rate for two maintenance mechanics/technicians by 50 cents, and that this agreement was probably unwritten. However, that is a far less significant change than the one at issue in this case. The health care reductions affect all members of the bargaining unit and could cost each unit member thousands of dollars annually. I conclude that the absence of any written confirmation of the agreement that Wille claims to have reached with Newsome and Campbell, given all the circumstances present here, weighs against crediting her testimony that such an agreement was reached.

The Respondent cites Board precedent for the proposition that an agreement can be enforceable even if it is not in writing. R. Br. at p. 13, citing, among other decisions, *Safeway Steel Products*, 333 NLRB 394, 400 (2001). That proposition is not controversial but it is also not relevant. The issue presented in this case is whether the parties reached an oral agreement at all, not whether such an agreement is enforceable.

based on her demeanor and testimony as whole. She seemed at times overly anxious to give testimony that was supportive of the Respondent's position. For example, in an effort to show that it was not unusual for the parties to make unwritten agreements to modify the CBA, Wille discussed the circumstances surrounding unwritten agreements that the parties had supposedly reached to allow special assignments for "peeler" employees and to permit employees to take vacation without the contractually required notice. However, the evidence showed that Wille had no direct knowledge regarding the circumstances of those purported agreements, including whether the parties confirmed them in writing at the time, because she had not even started working for the Respondent when those agreements were reached. (Tr. 190-191 and 199.) In addition, Wille's gave the impression of being extremely impatient to see the health care changes implemented for the B&C unit. This is shown, *inter alia*, by her premature filing of the reopening notice and her insistence on going ahead with a date for federal mediation even after Newsome stated that the Union could not be present on that day. By the time of the December 14 meeting, that impatience would have been further aggravated by the Union's resistance to the changes and by the revelation that the November 8 reopening notice was void and that the reopening timelines would run again from Fuller's December 6 letter.

On the other hand, I found Campbell and Newsome to be credible based on their demeanor and the record as a whole. Their testimony regarding what was said at the December 14 meeting was quite consistent and mutually corroborative.⁶ Moreover, Campbell's and Newsome's post-December 14 behavior was consistent with their testimony that no agreement was reached. After Campbell received his January 12 paycheck showing the reduction in health care benefits, he contacted Newsome to tell him about the change. On January 13, Newsome complained to Wille that the Respondent had made the reductions without the Union's consent or an arbitrator's ruling. This is precisely what I would expect Campbell and Newsome to do if, as they testified, the reductions had been made without their consent. There is no obvious explanation for why Campbell and Newsome would agree to the reductions and then turn around and object as soon as the Respondent distributed paperwork revealing that those reductions had been implemented. If, as the Respondent asserts, Campbell and Newsome were trying to delay the implementation of the reductions I believe that they would not have agreed to those reductions within minutes of starting negotiations on December 14. Rather they would have done exactly what they testified that they did—refuse to agree and require the Respondent to go through all the steps in the contractual reopening process.⁷

⁶ The Respondent points out that Campbell and Newsome disagreed about which room the meeting was held in. I do not think that this lapse meaningfully undermines their testimony regarding what was said at the meeting. It would be a more significant discrepancy if there was a dispute about whether the meeting took place, or whether Campbell and Newsome attended it, but those matters are not in dispute.

⁷ The Respondent suggests that agreement must have been reached, otherwise the Union would have scheduled more negotiating sessions or moved the process forward to mediation and arbitration. I disagree. Since the Respondent was the party that wished to change the contrac-

Newsome's and Campbell's testimonies are also corroborated by the handwritten notes that Newsome made during the meeting. According to those notes, the meeting closed with the Union taking the following position: "If you want to continue with the reopener clause—you can & we will let an Arbitrator make the decision. We cannot agree to the change." It is true that the Respondent introduced a contrary handwritten account by Wille. However, when Wille was questioned about this document, she was unable to recall whether she wrote the account during the meeting or after it. Therefore, I consider that document less reliable than the one that Newsome created during the meeting.

F. Complaint Allegation

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) when, on about January 1, 2012, it implemented changes to the contractual health and welfare benefits provided to employees represented by the B&C Union without following the procedures set forth in the contractual reopening clause and without the Union's consent.

DISCUSSION

The General Counsel can show a violation of Section 8(a)(5) and (1) by establishing the existence of a contractual provision and the Respondent's failure to adhere to that contractual provision. *Des Moines Cold Storage, Inc.*, 358 NLRB No. 58, slip op. at 1 (2012). The Respondent has a defense if it shows that the Union consented to the changes. *Id.* In this case the record establishes that the CBA between the Union and Respondent contained provisions requiring the Respondent to provide certain health care benefits to B&C unit employees and also creating a process by which either party could reopen negotiations regarding those benefits during the term of the contract and seek a resolution through binding arbitration in the event that they could not reach agreement. The record also establishes that the Respondent reduced the contractual health care benefits of employees in the B&C unit without obtaining the Union's agreement and without obtaining an arbitrator's ruling. Therefore, the General Counsel has established a violation. The Respondent attempts to defend by arguing that the B&C Union agreed to the changes during negotiations on December 14, 2012. However, as discussed above, the evidence showed that during the negotiating session on December 14 the Respondent not only failed to secure the Union's agreement to the proposed reductions, but that the union representatives explicitly stated that they did *not* agree to the reductions. Therefore, the Re-

spondent violated Section 8(a)(5) and (1) when it changed employees' health care benefits on January 1, 2012.⁸

spondent violated Section 8(a)(5) and (1) when it changed employees' health care benefits on January 1, 2012.⁸

As discussed above, I found the union witnesses' account of what was said at the December 14 negotiating session more credible than the contrary account of the Respondent's witness. However, even if I had credited Wille's version of what was said, that would still not show that the Union agreed or consented to have the unit's health care benefits reduced. Wille conceded that neither of the union representatives ever said that they agreed with the changes. Rather she testified that agreement had been reached regarding the reductions because Newsome said that the "the contract did give [the Respondent] the right to make the changes." Even if Newsome had made that statement, it would merely represent his belief—his *mistaken* belief—regarding the Respondent's rights under the CBA, not the Union's agreement or consent to modify either the health care benefits or the reopening process. In her testimony, Wille said that her interpretation was that Newsome was saying he believed the Respondent would prevail if the matter went to arbitration. However, if one accepts both that Newsome said what Wille says he did, and that Wille's rather strained interpretation of his statement is accurate, that would still only mean that Newsome had made a prediction about what the Respondent would have the right to do *after* arbitration. It would not mean that the Union agreed that the Respondent had the right to reduce benefits on January 1 at a time when the parties had not arbitrated the matter.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(5) and (1) when, on January 1, 2012, it implemented changes to the contractual health and welfare benefits for employees represented by the B&C Union without following the procedures set forth in the contractual reopening clause and without the Union's consent.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent violated Section 8(a)(5) and (1) when, on January 1, 2012, it implemented changes to the contractual health and welfare benefits provided to employees represented by the B&C Union without following the procedures set forth in the contractual reopening clause and without the Union's consent.

REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by its midterm modification of unit employee's health and welfare benefits, I shall order the Respondent to restore and maintain the health and welfare benefits provided for by the CBA, until such time as either it satisfies the conditions for changing those benefits under the contractual reopen-

⁸ Even assuming that Wille misunderstood what Campbell and Newsome said at the December 14 meeting, and believed that agreement had been reached on the changes, there was no enforceable agreement because there was no meeting of the minds between the parties. See, e.g., *American Standard Co.*, 356 NLRB 4 (2010).

ing clause or the contractual healthcare benefits provision ceases to be in effect. See *Des Moines Cold Storage*, 358 NLRB No. 58, slip op. at 1 (the remedy for unlawful contract modification is to honor the contract). In addition, the Respondent shall reimburse unit employees for any expenses resulting from the modification of the collective-bargaining agreement, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn.2 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), plus interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.⁹

ORDER

The Respondent, Mike-Sell's Potato Chip Co., Dayton, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Making midterm modifications to the health and welfare terms of the collective-bargaining agreement with the Bakery, Confectionary, Tobacco, Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC (the B&C Union) without following the contractual reopening procedures and without the Union's consent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon the B&C Union's request, restore to employees in the bargaining unit the contractual health and welfare benefits they enjoyed before the Respondent unlawfully modified the benefits on January 1, 2012; make all bargaining unit employees whole for all losses they may have suffered as a result of the Respondent's unlawful actions, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the

Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 3, 2012

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make midterm modifications to the health and welfare terms of our collective-bargaining agreement with the Bakery, Confectionary, Tobacco, Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC (the B&C Union) without following the contractual reopening procedures and without the Union's consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon the B&C Union's request, restore to employees in the bargaining unit represented by the B&C Union the contractual health and welfare benefits they enjoyed before we unlawfully modified those benefits on January 1, 2012.

WE WILL make whole, with interest, all our employees in the

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

bargaining unit represented by the B&C Union for any losses they may have suffered as a result of our unlawful modification of the health and welfare terms of the collective-bargaining agreement.

MIKE-SELL'S POTATO CHIP CO.